

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

VICKI A. JANACK,

Plaintiff,

-against-

7:06-CV-0624
(LEK/GJD)

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

DECISION AND ORDER

This matter comes before the Court following a Report-Recommendation filed on November 28, 2007 by the Honorable Gustave J. DiBianco, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b) and L.R. 72.3 of the Northern District of New York. Report-Rec. (Dkt. No. 17). After ten days from the service thereof, the Clerk has sent the entire file to the undersigned, including the objection by Plaintiff Vicki Janack (“Plaintiff”), which was filed on December 4, 2007. Objection (Dkt. No. 18).

It is the duty of this Court to “make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b). “A [district] judge... may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” Id.

The Report-Recommendation determined that the Appeals Council had declined to reopen the previous decision against the Plaintiff and that, accordingly, there was no ground for judicial review of the Appeals Council decision. Report-Recommendation (Dkt. No. 17) at 8-9 (citing Califano v. Sanders, 430 U.S. 99, 107-109 (1977)). Plaintiff objects to this determination, arguing that the Appeals Council review constituted “constructive reopening” of the earlier decision and that judicial review was thus proper. Objection (Dkt. No. 18) at 7-8. If the Appeals Council “reviews the entire record and renders a decision on

the merits, the earlier decision will be deemed to have been reopened,” subjecting the claim to judicial review. Byam v. Barnhart, 336 F.3d 172, 180 (2d Cir. 2003) (internal quotations omitted). The Court of Appeals for the Second Circuit has ruled that a review to determine whether Plaintiff has demonstrated good cause for reopening does not constitute constructive reopening. Id. The Appeals Council decision at issue here examined whether there was a basis for reopening the prior decision; it did not constructively reopen the earlier decision. Having considered the objections and undertaken a de novo review of the record, the Court has determined that the Report-Recommendation should be approved for the reasons stated therein. Accordingly, it is hereby

ORDERED, that the Report-Recommendation (Dkt. No. 17) is **APPROVED** and **ADOPTED** in its **ENTIRETY**; and it is further

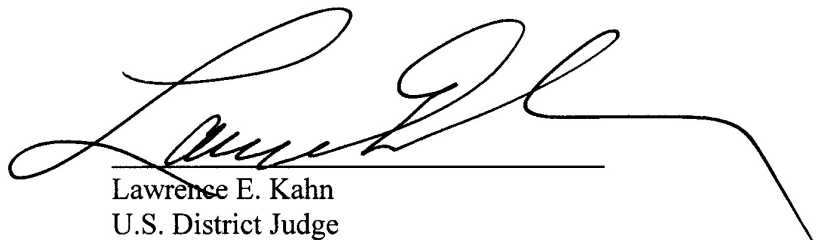
ORDERED, that Defendant’s Motion to Dismiss (Dkt. No. 11) is **GRANTED**; and it is further

ORDERED, that Plaintiff’s Complaint (Dkt. No.1) is **DISMISSED**; and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties.

IT IS SO ORDERED.

DATED: January 14, 2008
Albany, New York



Lawrence E. Kahn
U.S. District Judge